STATE OF MICHIGAN

COURT OF APPEALS

CLEMENT C. SUTTMANN and HOLLY C. SUTTMANN,

Plaintiffs-Appellants,

v

WILLIAM H. NEDOW, individually and d/b/a/ NEDOW & SON and RUSSELL NEDOW, individually,

Defendants,

and

HASTINGS MUTUAL INSURANCE COMPANY,

Garnishee Defendant-Appellee.

UNPUBLISHED
February 2, 1999

No. 204421
Leelanau Circuit Court
LC No. 94-003465 NZ

Before: Griffin, P.J., and McDonald, and White, JJ.

PER CURIAM.

In this garnishment action, plaintiffs appeal as of right an order of the circuit court granting summary disposition in favor of garnishee defendant Hastings Mutual Insurance Company pursuant to MCR 2.116(C)(10). We reverse and remand for further proceedings.

I

In the lower court, garnishee defendant filed a "motion to dismiss garnishment" that the circuit court treated as a motion for summary disposition pursuant to MCR 2.116(C)(10). In support of its motion, garnishee defendant submitted to the circuit court its garnishee disclosure (which attached a certified copy of the insurance policy at issue), a brief of defendant garnishee in support of the motion, and a supplemental brief. Plaintiffs filed a brief and supplemental brief in opposition to the motion. Following a May 28, 1996, hearing on the motion, the matter was taken under advisement by the circuit court. No depositions or affidavits were submitted by either party. In granting summary disposition in

favor of garnishee defendant, the circuit court held that the Hastings Mutual Insurance Company policy at issue was an "occurrence" based policy and that there was no genuine issue of material fact that an "occurrence" had *not* occurred. In addition, the circuit court concluded that even if an occurrence had taken place, "Hastings would not have been obligated to pay the damages plaintiff seeks here, i.e., the repair of originally defective work." On appeal, plaintiffs allege that the lower court engaged in impermissible fact-finding[1] in ruling on a motion brought pursuant to MCR 2.116(C)(10). We agree.

II

In bringing a motion for summary disposition pursuant to MCR 2.116(C)(10), the movant must support its motion with affidavits, pleadings, depositions, admissions, or other documentary evidence sufficient to establish no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. It is only if the movant meets its burden that the opposing party must come forth with documentary evidence that rebuts the movant's prima facie showing. In *Quinto v Cross & Peters,* 451 Mich 358, 362; 547 NW2d 314 (1996), the Supreme Court set forth the following standards for a trial court's review of a motion brought under MCR 2.116(C)(10):

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
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> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals,* 205 Mich App 418, 420; 522 NW2d 335 (1994).

In the present case, although garnishee defendant alleges in conclusory terms that no "occurrence" occurred, no facts were submitted below to support such a conclusion. On the contrary, the only alleged facts relating to the issue of an occurrence are contained in plaintiffs' third amended complaint. In their complaint, plaintiffs allege major water leaks, excessive ice dams, and essential collapse of the main support beams and vertical columns of their home:

> 27. Plaintiffs Suttmanns and Albert and Mary Beth Rollings closed on the residence on or about June 30, 1993.
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> * * *
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> 31. Subsequent to closing, plaintiffs, Suttmanns became aware of what they perceived to be structural and/or venting problems with the roof that were aggravated

by excessive ice dam loading, thus causing additional loads on the remainder of the residence and causing major water leaks throughout the residence.

32. Plaintiffs Suttmanns experienced the occurrences of repeated excessive ice dam loading and ice build up on the roof. These became a triggering event that finally exposed the telltale clue of the damages to the residence.

33. The main support beams and vertical columns essentially collapsed under the weight of the excessive ice dam loading and repeated exposure to ice build up.

At the time of the filing of plaintiffs' third amended complaint on September 14, 1995, damages of over $10,000 were alleged and the "list of defects [was] not yet complete." Further, "restoration and exploratory work continues on a slow but gradual pace up to this date, and subsequent deficiencies are anticipated, due to the overall extremely substandard construction work."

III

First, the circuit court's conclusion that plaintiffs' damages are limited to the defective work product of the insured contractor is not supported by the record. No depositions or affidavits were submitted on this issue. In addition, there is no indication from plaintiffs' third amended complaint that their damages are limited to the defective work product performed by the Hastings contractor. Consequential damages and damage to other property appear to be alleged.

Second, we hold that plaintiffs' third amended complaint states a claim for an "occurrence" as defined by the policy. Plaintiffs' complaint alleges "major water leaks," "excessive ice dam loading," and the "essential collapse of the main support beams and vertical columns" of the residence. Such event-based claims are materially different from a claim involving nothing more than the mere diminution of value of a residence caused by allegedly defective workmanship. Here, an "accident" having a temporal and spatial location is alleged. See, generally, *Wheeler v Tucker Freight Lines Co, Inc*, 125 Mich App 123; 336 NW2d 14 (1983). Unlike *Hawkeye-Security Ins Co v Vector Const Co*, 185 Mich App 369; 460 NW2d 329 (1990), the present case does not involve "the defective workmanship . . . *standing alone*." *Id.* at 378. Rather, we conclude an accident and an "occurrence" are alleged in paragraphs 31-33 of plaintiffs' third amended complaint. Based on the current state of the record, such allegations are adequate to invoke coverage under the Hastings policy.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Gary R. McDonald
/s/ Helene N. White

[1] The circuit court relied, in part, on facts adduced in the prior case against defendants Nedow:

> This Court is familiar, in detail, with the facts in the underlying case which eventually was resolved when the parties entered into the Consent Judgment. It is the view of this Court that, in occupying the subject home, Plaintiffs were continually exposed to the same potentially harmful conditions. In this case, fortunately, there was no "accident"; albeit, the potential for a disastrous accident existed as a result of the Nedows' substandard construction. It is the view of this Court that Suttmanns' discovery of Nedows' defective work and structural deficiencies are not an "occurrence" as defined by the subject insurance policy and not an "accident" as defined by Michigan Law. *Frankenmuth Mut Ins v Piccard,* [440 Mich 539; 489 NW2d 422 (1992)], supra. [Emphasis in original.]

Evidence from the underlying action was not submitted by the movant and is not part of our record on appeal.